

**Upstate Home for Children, Inc. and Local 721,
Service Employees International Union, AFL-
CIO, Petitioner. Cases 3-RC-9859 and 3-RC-
9860**

December 16, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Petitioner's request for review of the Regional Director's Decision and Order, pertinent portions of which are attached. The Petitioner's request for review is granted. The Board has reviewed the entire record, and has decided to affirm the Regional Director's dismissal of the petitions for separate units of Licensed Practical Nurses (LPNs) and Registered Nurses (RNs) employed in the Employer's residential school and care facilities.

The record supports the Regional Director's findings that the Employer's nurses share overall common supervision with other professional and nonprofessional employees and play an important role in interdisciplinary team functions. Since March 1991, nursing services ceased functioning as a separate department, and was placed under the jurisdiction of the Education Department supervised and administered by School Director Patricia Kennedy. Kennedy testified that the primary reason for the change was the need for integration of nursing services into the Employer's interdisciplinary program. The Employer complies with state-mandated Individual Education Plans (IEP) and Individual Living Plans (ILP) by requiring that employees who work with students, including teachers, nursing staff, residential unit supervisors, and specialized therapists, participate in the formulation and implementation of an interdisciplinary care and treatment program that is tailored to an individual child or resident's needs. This program utilizes the specialized skills and knowledge of these employees to service the educational, health, medical, physical, sociological, behavioral, and residential living needs of the children and adult residents. Kennedy testified that state regulations require that each employee who takes care of a child in the Employer's educational and residential programs know what kind of medication a given child takes, the condition for which the medication is prescribed, and what the possible side effects of the medication may be.

The record also establishes that many nonnurses perform duties related to "medical" functions, such as passing medications, administering treatments, and dealing with sick children in classrooms or residences. Nonnursing staff employees in both the classrooms and

residences, such as classroom aides, child development aides, and teaching assistants, are certified to dispense medications.¹ Aides perform nursing functions by passing medications or administering treatments involving creams or soaps that are prescribed by a physician for extended field trips or daily outings. According to the testimony of Elizabeth Davis, the director of residential services, the recreational therapist attends daily outings and passes medications about 80 percent of the time on those outings. Nine child development aides are also certified to pass medications. Furthermore, G-tube feeding and catherizations can also be done by non-medical staff.

Apart from common supervision and integration of medical job duties, other significant terms and conditions of employment, such as hours of work and overlapping shift schedules, facilitate job function interchange and substantial and frequent contact among nurses and the Employer's other professional and nonprofessional employees. Like child development aides and shift charges in the residential units, nurses work a 6 a.m. to 2 p.m., 2 p.m. to 10 p.m., and 10 p.m. to 6 a.m. shift schedule. The "school day" extends from 8:30 a.m. to 3:30 p.m., and overlaps the nurses' day and afternoon shifts.

Nurses do not function in a special infirmary or hospital-like setting and are not isolated from other employees working in the school and residential program. The nursing area is located next to classroom 6 at the Employer's main campus at Milford Center. The nurses have daily contact with teachers, therapists, the adaptive physical education teacher, and the residential unit staff such as child development aides. Educational staff visit the nurses' area to report abrasions, cuts, seizures, or other medical incidents. Interchange regarding the care of specific patients occurs routinely between nurses and other caregivers during the day such as at morning feeding when medications or eating patterns are discussed with unit staff, when a child's health restrictions or problems require nurse participation on a mealtime assessment team, during daily discussions regarding school programming, through teacher-nurse coordination of field trips, through nurse discussion of the swimming program with the adaptive physical education teacher, or through nurse participation in behavioral management programs.

Although nurse contact with education department employees ends with the schoolday, thereafter nurses have daily contact with residential department employees, who continue daily programming and care. When

¹ Community Residence Program Director William Twasutyn testified that the community residence RN spends 40 percent of her time training nonprofessional staff to administer medications and to meet adult resident health needs. Another 40 percent of her time involves supervision of resident charts to ensure resident staff implementation of physician recommendations. Like professional RNs, the recreational therapist works weekends.

the student is "passed" to residential services, the residential staff receive ongoing verbal reports from nurses that evaluate student health. They also have access to a "communication book" that contains information on health situations and directions for health care. When students leave the residence to go to a doctor's appointment, they are supervised by an RN or LPN and a shift charge or child development aide.

Although RNs and LPNs do not routinely participate in residential unit meetings, Davis testified that nurses informally visit and converse daily with residential staff after rendering treatments or dispensing medication. Similarly, Kennedy testified that the exchange of information is very good and nurses communicate with residential staff about how a child is feeling and eating.

Based on the foregoing, we agree with the Regional Director that the Employer's nurses share common supervision with other professional and nonprofessional groupings and play an important role in interdisciplinary care and treatment plans tailored to meet the needs of handicapped students and residents. The record also establishes that nurses share other significant terms and conditions of employment that facilitate a high degree of functional integration with the workforce and close contact with other professional and nonprofessional employees. For example, overlapping hours of work and shift schedules foster job function interchange and substantial and frequent contact among nurses and other employees working together as part of the Employer's team approach to meet the needs of handicapped students and residents. Accordingly, we agree with the Regional Director that the petitioned-for units do not constitute identifiable groups sharing a sufficiently distinct community of interest sufficient to warrant separate "nurses only" voting units.

APPENDIX

Regional Director's Decision and Order

Upstate Home for Children, Inc. (the Employer) operates a residential school for mentally retarded children at its Milford Center facility. In addition, the Employer operates six community residences for mentally retarded adults.

The Employer, a New York State not-for-profit corporation, affiliated with the American Baptist Church, is governed by a 20-person board of directors. While directors are church selected, eligibility for employment and admittance into the Employer's program is nondenominational. Approximately 97 percent of the Employer's revenues, which is in excess of \$5 million, is received from state and Federal agencies,² with the remainder from private donations.

Funding through State mechanisms is based on mathematical formulae which take into consideration full time equi-

valents in staff and availability of money. Although various state regulations are applicable to the Employer's programs, these regulations do not relate to specified terms and conditions of employment.

The Employer contends that due to its sources of funding, pervasive state regulation of its operations and its religious affiliation the Board "either lacks or should not exercise jurisdiction." I find these contentions to be without merit. In this regard I note there is no requirement that department heads, employees, or those admitted to the programs be religiously affiliated. Moreover, there is no contention made nor evidence presented that the Church exercises any influence with respect to day-to-day administration or course of care. Accordingly, assertion of jurisdiction does not pose a risk of infringement on the first amendment. See *Hanna Boys Center*, 284 NLRB 1080 (1987); *Livingston College*, 286 NLRB 1308 (1987). Inasmuch as the Employer has gross revenues in excess of \$5 million, of which an amount in excess of \$75,000 is received from Federal funds, it is clear that the Employer meets the appropriate standard for discretionary jurisdiction for institutions engaged in the care and custody of children, as well as statutory jurisdiction. See *Saratoga County Economic Opportunity Council*, 249 NLRB 453, 455 (1980); *Hudelson Baptist Children's Home*, 276 NLRB 126 (1985). Finally, in light of the fact that the State does not dictate how funds are specifically used, I conclude the Employer retains sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining.³ The fact that state regulations pertain to operational aspects, apart from labor relations, does not warrant a contrary conclusion. See *Long Stretch Youth Home*, 280 NLRB 678 (1986); *Community Interactions*, 288 NLRB 1029, 1032 fn. 12 (1988). Accordingly, I conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction herein.

Petitioner in Case 3-RC-9859 seeks to represent a unit of registered nurses (RNs) (five employed in the residential school and one in the community residence program). In Case 3-RC-9860 Petitioner seeks to represent a unit of licensed practical nurses (LPNs) (seven employed in the residential school program).

The residential school, which serves 48 children referred by individual school districts throughout the State, consists of a school function, generally operating on a traditional school calendar and hours and a residential program which cares for the children during nonschool time. The school, which falls under the purview of Patricia Kennedy, school director, is staffed with six classroom teachers, one adaptive physical education teacher, one library media specialist, one staff development specialist, one physical therapist, one speech therapist, one recreational therapist, and one psychologist, all of whom have a 4-year or more degree and state licensure or certification. In the classroom teachers are assisted by nine teacher assistants and two to four teacher aides per classroom. Additional school program personnel include an assist-

²For the fiscal year ending June 1991, the Employer received Federal funds in excess of \$75,000.

³In *R. W. Harmon & Sons, Inc.*, 297 NLRB 562 (1990), relied on by the Employer in its brief, the Board concluded that the Employer had "not met its burden of showing that it is not free to set the wages, benefits and other terms and conditions of employment for its employees." The record in the instant case discloses that the Employer has "the final say on the entire package of employee compensation." *Id.*

ant occupational therapist (2-year degree, licensed); a physical therapy assistant (2-year degree, licensed); two speech therapist assistants (state certified), and three prevocational assistants.

When not in the classroom, the children fall within the overall responsibility of Elizabeth Davis, director of residential services. Each of the four residential units is headed by a unit supervisor. Additional staff include 9 shift charges, a total of approximately 65 team coordinators and child development aides, 6 housekeepers, 2 laundry personnel, and a recreational therapist.⁴ Nursing Services, which falls under Kennedy's oversight, is headed by nursing coordinator Madeline Sansevere, a non-RN. A lead nurse, Diane Dixon, has responsibility for professional care. The LPNs and RNs perform identical functions although it appears that and LPN will consult with an RN if unsure on how to handle a situation. The RNs and LPNs (nursing staff) provide service 7 days a week on a 24-hour basis. The work primarily consists of passing out and charting medication⁵ and performing routine medical treatments, such as catheterizations. The nursing staff perform their duties throughout the campus facility, including the residential units and classrooms. The nursing staff, as estimated by Petitioner's employee witness, spends approximately 10 percent of the workday in contact with other staff concerning student needs. In this regard residential staff and school staff bring student health concerns or direct inquiries to the nursing staff. Various specialized staff, such as the occupational therapist, contact the nursing staff for certain follow through treatment. On occasion the nursing staff accompany students and other staff on field trips or to medical appointments.

As described by Kennedy, those employees who work with students, including teachers, nursing staff, various therapists, and other professional staff participate in formulation and implementation of Individual Education Plans (IEP) and Individual Living Plans (ILP), which are mandated by the State and provide an outline of the care and program administered to the individual student.

The Employer's six residential homes, one located at Milford Center and the remainder within 20 miles of Milford Center, serve approximately 60 mildly and profoundly retarded adults, age 21-69. The program is headed by William Twasutyn, program director, who supervises a total of 66 employees, including residential counselors, shift coordinators and an RN. The community residence RN covers the six homes and trains staff to meet state regulations and the needs of patients, including administration of medication. In addition, this RN oversees resident charts to ensure that doctor recommendations are implemented by staff.

The Employer has a total staff of 255 individuals. While work periods for those involved in teaching conform to the school calendar, all employees regardless of program, work

under one employee handbook which governs terms and conditions of employment. The Employer operates under one budget and one payroll.⁶ On occasion employees working in one program have transferred to the other. Similarly, it appears that employees in one program have substituted in the other.

Petitioner contends that the RNs and LPNs, due to the nature of their training, job functions, and conditions of employment, constitute appropriate bargaining units and that an election should be ordered allowing the RNs to vote for representation and for affiliation with the LPN bargaining unit sought.

The Employer, apart from its jurisdiction arguments, contends that in light of the degree of functional integration of the work force, and the close contact of the nursing staff with both professional and other employees that under either a community-of-interest or disparity-of-interest standard the petitioned-for units are inappropriate.

Although not fully developed in the record, it appears by reason of education and duties that the RNs together with teachers and various therapists constitute a group of professional employees who share common supervision and terms and conditions of employment. Similarly, the LPNs by way of education and duties appear to be part of a technical group, together with various therapy assistants who share common supervision and terms and conditions of employment. It further appears that nursing staff members have regular contact with other staff, including arguably professional and technical employees, with whom they interact to develop treatment and care plans for those served by the Employer's operations.

In view of the foregoing, and the record as a whole, I find that the petitioned-for units do not constitute identifiable groups sharing a sufficiently distinct community of interest.⁷ Rather, both groups of employees share significant policies and terms and conditions with other employees, and the Employer's team approach to delivery of services results in substantial contact with other employees. Accordingly, the separate units sought are not appropriate. *Alexian Bros. Hospital*, 219 NLRB 1122 (1975); *North Arundel Hospital Assn.*, 279 NLRB 311 (1986). The Petitioner has failed to affirmatively express a desire to proceed to an election in the event units different from that petitioned for were found appropriate.

⁶The record is silent as to the Employer's pay structure. Nursing staff, maintenance workers, housekeepers, cooks, and child development aides are hourly paid. Teachers, teachers aides, and the various therapists are salaried.

⁷Although the Employer is not a health care institution (see *Contemporary Guidance Services*, 291 NLRB 50, 52 (1988)), I note that the petitioned-for units would be found inappropriate under the standards extant prior to the adoption of the Health Care Rules. See *Trinity Memorial Hospital*, 219 NLRB 215 (1975). In this regard the Board's recent decision in *Park Manor Care Center*, 305 NLRB 872 (1991), directs utilizing a broad approach, including "community of interest" factors in determining appropriate units in nonacute health care institutions.

⁴The recreational therapist holds a 4-year degree and licensure.

⁵It appears to some extent that medications are also passed out by nonnursing staff.